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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GREG DAVIS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Did the United States Court of Appeals for the Ninth Circuit violate the Due Process Clause of the United States Constitution and the Federal Rules of Criminal Procedure in denying the Petitioner's Motion for New Trial Based on Newly Discovered Evidence;

(1) where such evidence constituted significant and substantial evidence of a negative and impeaching nature concerning the criminality of a law enforcement officer who testified as the key governmental witness, and,

(2) where such evidence was not merely cumulative, and,

(3) where the Petitioner specifically requested the impeachment information prior to trial, and continued to be diligent in his efforts to secure this evidence, and,

(4) where such information, at the time of the Petitioner's request, was known and available to the government, and,

(5) where the introduction of the evidence withheld by the government would have resulted in a different outcome at trial, and,

(6) where the opinion of the United States Court of Appeals for the Ninth Circuit would cause conflict among the federal courts in subsequent decisions regarding access to evidence issues?

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PETITION FOR WRIT OF CERTIORARI

COMES NOW, GREG DAVIS (hereinafter "Petitioner"), and prays that a Writ of Certiorari issue to review the judgment of the United States Ninth Circuit Court of Appeals of the case entitled *United States v. Davis*, 960 F.2d 820 (9th Cir. 1992), *reh'g denied*, —— F.2d —— (9th Cir. 1992), Slip Opinion (9th Cir. No. 89-50335, 5/15/92). The appellate decision affirmed the United States District Court Order denying the Petitioner's Motion for New Trial Based on Newly Discovered Evidence. Timely filing of this Motion occurred June 27, 1990. The U.S. District Court, Central District of California, conducted a hearing on the Motion for New Trial on August 13, 1990. The request for this Writ is made pursuant to the Rules of the United States Supreme Court. Sup. Ct. R. 14.1(b).

This Court has discussed the issue of revelation of evidence favorable to the accused in a criminal prosecution. The seminal decision directing the instant case is *Brady v. Maryland*, 373 U.S. 83 (1963). After *Brady*, this Court further refined the scope of evidence the prosecution must reveal to the accused. *See, e.g., United States v. Agurs*, 427 U.S. 97 (1976); *see, also, United States v. Bagley*, 473 U.S. 667 (1984).

It is respectfully submitted that the United States Court of Appeals for the Ninth Circuit has misapplied the fundamental holdings, reasoning and constitutional underpinnings of *Brady* and its progeny. It is respectfully submitted that the Ninth Circuit reached an incorrect conclusion in the instant case. They held that the prosecution need not reveal to a defendant significant evidence reflecting on the veracity and integrity of a key governmental witness. This decision was reached even though the impeaching evidence was in the government's possession or they had immediate access to the information. The government conduct was additionally reprehensible since a specific request for this impeaching information was made by the Petitioner well in advance of trial. The significance of the information would have inured to the benefit of the Petitioner and led to a different result in this case. Specifically, the information sought for impeachment purposes concerned a corrupt law enforcement officer. The officer was subsequently indicted, tried and convicted of myriad crimes.

This case portends an opportunity for this Court to address an issue of grave concern. In addressing this issue, the Court can offer guidance to the appellate courts in resolving similar fact patterns. Circuit courts would no longer offer merely conclusory opinions. Judicial opinions would rest on a solid foundation of analytical reasoning and judgment. This would result in greater judicial consistency and efficiency.

STATEMENT OF THE GROUNDS ON WHICH THE WRIT OF CERTIORARI IS INVOKED

The Petitioner seeks a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit. *See, United States v. Davis*, 960 F.2d 820 (9th Cir. 1992), *reh'g denied*, —— F.2d ——, Slip Opinion (9th Cir. No. 89-50335, 5/15/92), attached hereto as Appendix "A." The district court discussed this case in a published opinion, *United States v. Davis*, 715 F. Supp. 1473 (C.D. Cal. 1989), attached hereto as Appendix "B." The district court opinion discussed the constitutionality of the Federal Sentencing Guidelines and ruled them unconstitutional. The Ninth Circuit's published opinion resulted from the United States District Court's denial of the Petitioner's Motion for New Trial Based on Newly Discovered Evidence. *See, United States v. Davis*, DC No. SA-CR-88-036-JSL (Order Denying New Trial) (9/18/90), attached hereto as Appendix "C." The district court did not publish an opinion expressing its reasons for denying the Petitioner's Motion.

The appellate court issued its opinion on March 31, 1992. The Petitioner sought rehearing. In a brief Memorandum Order, the Ninth Circuit denied rehearing on May 15, 1992. *See, United States v. Davis*, —— F.2d ——, Slip Opinion (9th Cir. No. 89-50335) (5/15/92), attached hereto as Appendix "D."

The United States Supreme Court has jurisdiction to review the judgment below by Writ of Certiorari. 28 U.S.C. § 1254(1); *see, generally, The Conqueror*, 166 U.S. 110, 113-14 (1897); *see, also, United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); and, *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Fifth Amendment to the Constitution of the United States provides, in part:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. V.

The Federal Rules of Criminal Procedure provide, in part:

> (a) Disclosure of Evidence by the Government.
>
> (1) Information Subject to Disclosure.
>
> * * * *
>
> (C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy . . . papers, documents . . . [and] tangible objects which are within the possession, custody or control of the government, and *which are material to the preparation of his defense.*
>
> * * * *
>
> (c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material *previously requested* or ordered, which is subject to discovery or inspection under this rule, he shall *promptly notify the other party* . . . of the existence of the additional evidence or material.

Fed. R. Crim. P. 16(a)(1)(C); Fed. R. Crim. P. 16(c) (emphasis added).

STATEMENT OF THE CASE

A. Procedural History of the Federal Criminal Trial

1. *The Indictment Charging Conspiracy, Attempted Possession with Intent to Distribute Cocaine, Criminal Forfeiture, and Unlawful Use of a Communication Facility*

On May 19, 1988, the government filed a criminal complaint in the United States District Court for the Central

District of California. The complaint charged the Petitioner and several co-defendants with various controlled substance offenses. *See, United States v. Davis*, DC No. SA-CR-88-36-JSL(D1) (Complaint and Affidavit) (5/19/88). This document is not provided in the Appendix. It will be provided upon request. It is important to note at this point that counsel for the Petitioner represents, as an officer of the Court, that any document not provided in the Appendix has, in fact, been tendered to, read, and reviewed by the courts below. Inclusion in the present Petition is restricted by space limitations. All documents requested by this Court will be tendered immediately upon request. Alternatively, all documents will be placed before this Court upon acceptance of this Petition.

On June 3, 1988, the grand jury indicted the Petitioner and several co-defendants with:

> Count 1—violation of 21 U.S.C. § 846; Conspiracy; Attempted Possession with Intent to Distribute Cocaine;
>
> Count 2—violation of 21 U.S.C. § 853(a)(2); Criminal Forfeiture;
>
> Count 3—violation of 21 U.S.C. § 843(b); Unlawful Use of a Communication Facility.

See, United States v. Davis, DC No. SA-CR-88-36-JSL(D1) (Indictment) (6/3/88). This document is not provided in the Appendix. It will be provided upon request.

On August 9, 1988 the federal grand jury handed down a First Superseding Indictment charging substantially the same crimes:

> Count 1—violation of 21 U.S.C. § 846; Conspiracy; Attempted Possession with Intent to Distribute Cocaine;
>
> Count 2—violation of 21 U.S.C. § 853(a)(2); Criminal Forfeiture;

Count 3—violation of 21 U.S.C. § 843(b); Unlawful Use of a Communication Facility.

See, United States v. Davis, DC No. SA-CR-88-36-JSL (D1), (First Superseding Indictment) (8/9/88). This document is not provided in the Appendix. It will be provided upon request. The Petitioner and his co-defendants faced trial under the First Superseding Indictment.

The First Superseding Indictment alleged the Petitioner and his co-defendants engaged in a conspiracy beginning on an unknown date and continuing until May 19, 1988. The object of this conspiracy was to possess and distribute approximately one hundred (100) kilograms of a controlled substance. A meeting between the Petitioner, an informant, and two undercover law enforcement agents accomplished the alleged conspiracy. The defendants supplied cash in a "reverse sting" operation. The police were to supply the controlled substance. One of those undercover agents was Los Angeles County Deputy Sheriff Marcario Duran, (hereinafter "Duran.") The Indictment further alleged that by using a telephone to bring the money to the meeting site, the Petitioner unlawfully used a communication facility.

The Petitioner entered a "not guilty" plea to each count of the First Superseding Indictment. By timely pretrial motion, the Petitioner specifically requested the government provide *Brady* material relative to Deputy Duran. Trial began in October, 1988. On October 25, 1988 a jury convicted the Petitioner on the three counts of the indictment.

On June 16, 1989, Judge J. Spencer Letts sentenced the Petitioner to twenty (20) years in prison. After incarceration, the Petitioner must serve five (5) years of supervised release under standard terms and conditions. *See, United States v. Davis*, DC No. SA-CR-88-36-JSL (D1) (Excerpts of Sentencing Transcript), pp. 31, 32, 34, 74 (6/16/89). This document is not provided in the Appendix. It will be provided upon request. Presently, this

sentence has been remanded for a new sentencing determination. The district court judge's finding that the Sentencing Guidelines were unconstitutional was reversed by the United States Court of Appeals for the Ninth Circuit. As of the date of this Petition there has been no new determination of the Petitioner's sentence. The Petitioner is presently incarcerated at the federal prison in Phoenix, Arizona.

There was a significant period between conviction and sentencing. This was because the district judge held the Federal Sentencing Guidelines unconstitutional. *See, generally, United States v. Davis*, 715 F. Supp. 1473 (C.D. Cal. 1989).

2. *Facts Related in the Criminal Trial and the Subsequent Developments that Caused the Appeal and Writ of Certiorari*

The Petitioner and his co-defendants faced trial in October of 1988. A jury convicted the Petitioner and his co-defendants. The chief government witness against the Petitioner was Los Angeles County Deputy Sheriff Marcario Duran.

Before trial, the Petitioner, through his counsel, was aware of Duran's sullied reputation. Duran had a reputation among the defense bar for disingenuous testimony. The Petitioner filed a Motion for Disclosure of Exculpatory and Impeaching Evidence to reveal Duran's corruption. *See, United States v. Davis*, DC No. SA-CR-88-36(A)-JSL, (Motion for Disclosure of Exculpatory and Impeaching Information and Memorandum of Points and Authority) (8/30/88). This document is not provided in the Appendix. It will be provided upon request. Revelations of Duran's criminality would have an adverse and detrimental effect on Duran's testimony against the Petitioner. Specifically, the Petitioner sought information on:

> 2.) Any and all records and information revealing prior criminal conduct . . . or *investigations against any [governmental] witness* . . .
>
> * * * *

> The accused further request as to each witness who was or is a law enforcement officer disclosure of the existence and identity of *all official internal affairs, internal investigations or public integrity investigation files* related to or connected with each such witness, *in order that further specific and appropriate motions or process can be addressed to such files for the development of impeaching information.*

United States v. Davis, DC No. SA-CR-88-36(A)-JSL, (Motion for Disclosure of Exculpatory and Impeaching Information), p. 2 (8/30/88) (emphasis added). The defense strategy was to impeach the credibility of the key governmental witness. Duran's wrongdoing was under scrutiny before, during and after the Petitioner's trial. The prosecutor was aware of or should have known about this investigation. The government was under a duty to disclose this information to the Petitioner. However, they willfully and intentionally withheld this valuable and significant impeachment evidence. The government denied that this information even existed.

Duran was part of a corrupt Narcotics Task Force, commonly called the "Majors." An anonymous letter received by the Los Angeles County Sheriff's Department alerted the authorities to Duran's criminality. The newspapers chronicled the extent of the wrongdoing. Duran, along with other deputies, stole money from drug dealers, mishandled evidence, laundered money, extorted money from drug dealers, evaded income taxes, and engaged in myriad other criminal acts. *See*, Victor Merina & Daryl Kelley, *U.S. Indicts 10 Sheriff Deputies, Los Angeles Times*, Feb. 21, 1990, at p. A1. This document is not provided in the Appendix. It will be provided upon request. The investigation of Duran and his criminal confederates began no later than the first portion of October, 1988. In a *Los Angeles Times* article it becomes clear Duran was under scrutiny before the Petitioner's trial began. The article states:

> The Sheriff's Department initiated this investigation . . . The FBI and the IRS *are also involved in the year-old inquiry.*
>
> * * * *
>
> "It's just incredible that they're not naming the officers because that throws every one of those sheriff's cases up for challenge," said (Director of Criminal Court's Bar Association of Los Angeles) Woods.

Victor Merina & Daryl Kelley, *Sheriff Suspends More officers in Drug Probe, Los Angeles Times*, Oct. 4, 1989, at pp. A1, A22. This document is not provided in the Appendix. It will be provided upon request. Comparing the date of the article with the age of Duran's investigation shows the government knew about the specific information requested by the Petitioner. The article reveals more. The government was keenly aware their case against the Petitioner would suffer irreparable harm if the criminal enterprise of Duran became known.

There is further evidence the government knew about Duran's illicit activities:

> The indictment (of 10 Los Angeles County Deputy Sheriffs) climaxed *a 16-month investigation* into what has become the worst scandal to shake the nation's largest sheriff's department in decades.
>
> * * * *
>
> According to the indictment, one of the deputies told a colleague *in late 1987* that he could "make him rich," and the following year crew members stole nearly $1.2 million in drug raids.

Victor Merina & Daryl Kelley, *U.S. Indicts 10 Sheriff Deputies, Los Angeles Times*, Feb. 21, 1990, at p. A1, A26. This indicates the Duran investigation began no later than late September or early October, 1988. Duran may have been under investigation *as early as 1987*. Undoubtedly, the prosecutor was aware his chief witness was a corrupt and greedy officer. Nevertheless, the prosecutor concealed this knowledge from the Petitioner. This case

becomes even more egregious because the Petitioner specifically requested impeachment evidence.

A possible explanation for secreting the impeaching information is:

> At least eight [narcotics related] cases have been dismissed by judges or withdrawn by prosecutors because the Sheriff's Department has refused to provide investigative records about suspended deputies or the deputies themselves could not testify.

Victor Merina & Daryl Kelley, *U.S. Indicts 10 Sheriff Deputies, Los Angeles Times*, Feb. 21, 1990. The government prosecutor vitiated his duty in the instant case. A prosecutor's duty, in any criminal proceeding, is to see that justice is done. Withholding witnesses information necessary for the accused to mount a proper defense does not serve the legitimate ends of justice.

The June, 1989, federal grand jury handed down an Indictment against Deputy Marcario Duran and ten (10) co-defendants. Three of the twenty-seven criminal counts implicated Duran. *See, United States v. Duran*, DC No. CR-90-111, (Indictment) (2/22/90). This document is not provided in the Appendix. It will be provided upon request. The Indictment alleged that as early as *December, 1987*, Duran may have been involved in the criminal enterprise. However, the Indictment states that *no later than June 2, 1988*, Duran became involved. *See, United States v. Duran*, DC No. CR-90-111, (Indictment), p. 5, (2/22/90). Later, the grand jury returned a First Superseding Indictment charging substantially the same criminality. Again, three of the twenty-seven counts implicated Duran. *See, United States v. Duran*, DC No. CR-90-111(A)-ER, (First Superseding Indictment) (5/25/90). This document is not provided in the Appendix. It will be provided upon request.

The United States District Court abused its discretion by denying the Petitioner's Motion for New Trial. Timely

disclosure of the negative, impeachment information would have affected the outcome of the trial. Specifically: (1) the investigation of Duran's criminality began before the Petitioner's trial, continued throughout trial, and did not end for months after the trial. The government cannot validly defend non-disclosure on lack of knowledge or inaccessibility; (2) the government's failure to disclose specifically requested impeachment information eviscerated effective cross-examination of Duran; and, (3) the government's failure to disclose specifically requested impeachment information denied meaningful confrontation of witnesses.

Deputy Duran offered significant testimony for the prosecution. We refer this Court to Duran's testimony about statements that Duran attributes to the Petitioner. *See, United States v. Davis*, DC no. SA-CR-88-36-A, (Trial Transcript), pp. 888-920 (10/19/88). This document is not provided in the Appendix. It will be provided upon request. The jury found this testimony significant because they requested it be re-read to them. *See, United States v. Davis*, DC no. SA-CR-88-36-JSL, (Trial Transcript), pp. 1289-1295 (10/24/88). This document is not provided in the Appendix. It will be provided upon request.

B. Procedural History of the Federal Criminal Appeal

On June 22, 1990 the Petitioner filed his Motion for New Trial Based on Newly Discovered Evidence. The newly discovered evidence about the chief governmental witness is detailed, *supra*. Petitioner filed his Motion as news of Duran's corruption first came to *public* light.

The Honorable Judge Letts denied the Petitioner's Motion for New Trial on August 13, 1990. The Court filed an Order Denying the New Trial on September 18, 1990. On August 15, 1990, the Petitioner filed a Notice of Appeal of the denial of his Motion for New Trial.

The United States Court of Appeals for the Ninth Circuit heard argument on appeal on November 7, 1991. On March 31, 1992, the Ninth Circuit denied the appeal. *See, United States v. Davis*, 960 F.2d 820 (9th Cir. 1992).

REASONS WHY THIS WRIT OF CERTIORARI SHOULD BE GRANTED

It is respectfully submitted by the Petitioner that there are two compelling reasons for granting a Petition for Writ of Certiorari. First, the Ninth Circuit Court of Appeals misapplied this Court's interpretation of discovery disclosure requirements mandated by the holdings of *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 97 (1976) and *United States v. Bagley*, 473 U.S. 667 (1984). These cases demonstrate that a prosecutor must disclose significant impeachment information regarding a government witness. This is particularly true when the accused makes a specific and detailed request for the information and the information would materially effect the trial's outcome.

The Court of Appeals incorrectly interpreted the disclosure requirement. They held disclosure is not mandatory in certain situations. These include cases where there is sufficient independent evidence to convict the defendant. This evidence must be independent of the testimony from the witness the accused seeks to impeach. This interpretation is incorect. This Court said due process requires the prosecutor to release all impeaching information about a government witness upon specific request by the defendant. This is true when such information is material to the result of the trial. When the government withholds information in its possession or to which it has reasonable access, they deny the accused significant due process rights.

Second, to permit the published opinion of the United States Court of Appeals for the Ninth Circuit to stand without clarification would lead to judicial inconsistency.

It would permit the Ninth Circuit's application of the discovery doctrine to perpetuate a conflict among the federal appellate courts. This Court has long-held that it is emphatically the province and duty of the judiciary to interpret the law of the United States. *See, Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803); *see, also, Cooper v. Aaron*, 358 U.S. 1 (1958).

Only by granting the Petition for Writ of Certiorari to correct the manifest injustice which the Petitioner endured will this Court's interpretation of law previously enunciated be effectuated. Succinctly stated, a young man will be remanded for resentencing at the guideline range of 360 months to life based on the testimony of a police officer who was viewed by the jury as honest and credible when, in fact, his credibility was easily attacked if the government had provided the timely requested information.

I. FRAMING THE ERROR OF THE NINTH CIRCUIT'S OPINION

The United States Court of Appeals for the Ninth Circuit erred in denying the Petitioner a new trial. In its opinion styled *United States v. Davis*, 960 F.2d 820 (9th Cir. 1992), the Court focused on an issue tangential to the invidious situation created in the instant case. The Ninth Circuit essentially decided whether newly-discovered impeaching evidence is ever sufficient to warrant a new trial. The appellate court states "when the effect of newly-discovered evidence is merely to impeach a witness, a new trial is unwarranted." *United States v. Davis*, 960 F.2d at 825 (9th Cir. 1992) (citations omitted).

The Court relies on *United States v. Walgren*, 885 F.2d 1417 (9th Cir. 1989) to discuss the effect of newly-discovered evidence on a Motion for New Trial. *Walgren* states that retrial is warranted based on newly-discovered evidence only when:

> (1) the evidence is newly discovered and was unknown to [the accused] at the time of trial, (2) the evidence is material, not merely cumulative or impeaching, (3) the evidence will probably produce an acquittal, and (4) failure to learn of the evidence sooner was not due to a lack of diligence.

United States v. Walgren, 885 F.2d at 1428 (9th Cir. 1989). The Court cites *United States v. Walgren*, 885 F.2d at 1428 (9th Cir. 1989) (citations omitted) for the proposition "[o]rdinarily, evidence impeaching a witness will not be material . . . because it will not refute an essential element of the government's case."

Notwithstanding the *Walgren* proscriptions, the Ninth Circuit established in *Davis* that "[i]n some situations . . . the newly-discovered evidence may be so powerful that, if it were believed by the trier of fact, it could render the witness' testimony totally incredible." *United States v. Davis*, 960 F.2d at 825 (9th Cir. 1922). In those cases, the testimony of the witness must be disbelieved and retrial granted. The *Davis* Court goes on to detail one particular situation in which newly-discovered evidence would warrant retrial:

> If newly discovered evidence establishes that a defendant in a narcotics case has been convicted solely on the uncorroborated testimony of a crooked cop involved in stealing drug money, the "interest of justice" would support a new trial under [Fed. R. Crim. P.] Rule 33.

United States v. Davis, 960 F.2d at 825 (9th Cir. 1992). This situation is the exact fact pattern established in the instant case. It would logically appear the lower court should have granted the Petitioner a new trial.

Nevertheless, the *Davis* Court limits the scope of constitutional guarantees and Federal Rules of Criminal Procedure. *See*, U.S. Const. amend. V; *see, also*, Fed. R. Crim. P. 33, discussed, *infra*. They conclude that newly-discovered impeachment evidence is never sufficient to

warrant retrial in instances where "there remains sufficient evidence to support all of the appellants' convictions." *United States v. Davis*, 960 F.2d at 827 (9th Cir. 1922).

The Ninth Circuit opinion in *Davis* does not address the constitutional element of the Petitioner's argument. The Court glosses over the invidious effect of their opinion. The Ninth Circuit discusses the *after-effect* of newly-discovered impeaching evidence on witnesses *during trial*. The Ninth Circuit does not address the problem of newly-discovered impeaching evidence, specifically requested by proper defense motion, *before trial*. The problem becomes more acute. The Ninth Circuit failed to consider that the prosecution either knew, should have known, or could reasonably discover the damaging evidence. The government's efforts overtly concealed the evidence from the defense.

It is respectfully submitted that the *Davis* opinion permits the government, when it is aware of impeaching evidence concerning their witnesses, to conceal this evidence. The government can simply opt-out of their discovery responsibilities by saying, "we just didn't know." At that point, the *Davis* opinion limits judicial inquiry. Under *Davis*, the question is not whether the government did, in fact, know about the impeaching information. Under *Davis*, the issue becomes whether there is sufficient independent evidence to convict the accused. Thus, access to evidence by the defendant becomes limited by the whim of the prosecutor. Access to evidence is no longer directed by judicial or legislative mandate. The jury is denied the "complete story" regarding the credibility of a crucial witness. The defendant is denied his *fundamental right to confront* the witnesses against him.

The issue takes on constitutional dimension. The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime . . . *nor be deprived of life, liberty, or property, without due process of law*

U.S. Const. amend. V (emphasis added).

The Federal Rules of Criminal Procedure interpret this constitutional provision to mean:

> Upon request of the defendant the government shall permit the defendant to inspect and copy . . . tangible objects . . . which are within the . . . control of the government, and which are *material to the preparation* of [the] defense.

Fed. R. Crim. P. 16(a)(1)(C) (emphasis added). Further,

> If, prior to or during trial, a party discovers additional evidence or *material previously requested or ordered, which is subject to discovery* or inspection under this rule, he shall promptly notify the other party . . . of the existence of the additional evidence or material.

Fed. R. Crim. P. 16(c) (emphasis added).

This Court delineated the meaning of deprivation of life, liberty or property without due process of law within the parameters of pre-trial evidentiary discovery. The seminal line of cases considering the scope and duty to disclose evidence to the accused are *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Agurs*, 427 U.S. 92 (1976), and *United States v. Bagley*, 473 U.S. 667 (1985).

The *Davis* opinion vitiates the intent of the Federal Rules of Criminal Procedure and the duty for prosecutorial disclosure of evidence favorable to the defense. Also, a citizen is denied the right of effective assistance of counsel and confrontation of witnesses.

II. DETERMINING THE EXTENT OF DISCLOSURE REQUIRED IN CRIMINAL CASES: FOCUS ON THE PROSECUTION

Of course, the prosecutor has defined duties of disclosure, permitting the defendant access to evidence. However, the disclosure duty is not limited to the prosecutor alone. It extends to his agents and other law enforcement officers and agencies. Further, the prosecutor has an affirmative duty to search the files of law enforcement agencies for requested information. In the instant case, both the prosecutor and law enforcement agents blatantly disregarded their disclosure duties.

The latest case addressing these duties is *United States v. Brooks*, —— F.2d ——, DC No. 91-3235 (D.C. Cir. 6/19/92), 51 Cr.L. 1303 (7/1/92). *Brooks* bears directly on the instant case. In *Brooks*, the defendant said the government violated their *Brady* obligation. They failed to check pertinent police intelligence files reflecting on the credibility of the chief governmental witness; a policewoman named Christie Hoyle. Before trial, Brooks sought to secure Hoyle's police files. The prosecutor, upon information supplied by the police department's attorney, declared Hoyle's file free of information reflecting on her credibility. Further, Internal Affairs had not investigated her. Hoyle's testimony was the only evidence linking Brooks to the alleged crime.

The test in *Brooks* does not focus on prosecutorial bad faith. However, the case makes clear that a *Brady* obligation extends to unsearched files outside the prosecutor's office. *United States v. Brooks*, 51 Cr.L. at 1303 (7/1/92) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987)). *Brooks* pinpoints the underlying rationale for his holding:

> [T]he courts' willingness to insist on an affirmative duty of inquiry may stem primarily from a sense that an inaccurate conviction based on government failure to turn over an easily turned rock is essentially as offensive as one based on government nondisclosure . . .

United States v. Brooks, 51 Cr.L. at 1303 (7/1/92).

Brooks relies on cases finding a duty to search files maintained by coordinate branches of government "closely aligned with the prosecution." *See, e.g., United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985). The facts of *Brooks* are virtually the facts of the instant case, except for the names of the governmental agencies:

> Given the close working relationship between the Washington (Los Angeles County Sheriff's Office in this case) metropolitan police and the U.S. Attorney for the District of Columbia (U.S. Attorney for the Central District of California in this case), a relationship obviously at work in this prosecution, the [disclosure] duty must reach the police department's homicide and Internal Affairs Division files.

United States v. Brooks, 51 Cr.L. at 1304 (7/1/92).

Finally, the prosecutor is held responsible for actions of the police officers themselves. Arguably, Duran may invoke his Fifth Amendment privilege to shield his criminal activities. However, this privilege does not extend to other police officers, officials, or investigative agencies. *Barbee v. Warden*, 331 F.2d 842, 846 (4th Cir. 1964) noted:

> [I]t makes no difference if the withholding is by officials other than the prosecutor, [because], the police are also part of the prosecution, and the taint in the trial is no less if they, rather than the State's Attorney, were guilty of the non-disclosure.

The Seventh Circuit characterized the instant situation as avoidance. They said:

> A prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case.

Carey v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984).

The Ninth Circuit erred because they did not impose the proper remedy when the prosecution withholds *Brady*

material either by willful misconduct, negligent investigation, police misfeasance or culpable avoidance.

Brooks is the most recent case addressing the defendant's right to obtain certain prosecutorial evidence against him coupled with the governmental duty to disclose the evidence. *See, Mooney v. Holohan*, 294 U.S. 103 (1935). The *Mooney* Court said that prosecutorial misconduct constituted a violation of due process. The Court focused on the prosecutor's knowing use of perjured testimony to secure a conviction. They considered this to be the most reprehensible type of conduct.

The facts of this case are no less egregious. The Petitioner made a specific discovery request for all material reflecting directly on the veracity of the chief governmental witness. The Petitioner made this request because of Duran's reputation as a corrupt deputy. The Petitioner sought this evidence to convince the jury to disregard Duran's testimony as not credible. The District Court was aware of the essential nature of the Petitioner's request:

> Defense Counsel [Chesnoff]: Your Honor, when we made the original specific request, I can represent to this Court as an officer of the court that the reason we did it was Mr. Duran had a *terrible reputation among defense counsel for not being truthful during testimony and also suspicion that he engaged in corrupt acts.*
>
> * * * *
>
> Certainly nothing could be more dramatic or effective for a citizen accused than to be able to inquire of a law enforcement officer as to acts of corruption, and as to acts of deceit that affect the question of whether or not when that law enforcement officer takes the oath before Your Honor whether he's perjuring himself.

United States v. Davis, DC No. SA-CR-88-36-JSL (Motion for New Trial Transcript), pp. 9-10 (8/13/90) (emphasis added). This document is not provided in the Appendix. It will be provided upon request.

By using perjured testimony and false evidence, the *Mooney* prosecutor committed a perversion of the judicial process no less serious than the instant case. The *Davis* prosecutor volitionally chose to conceal damaging impeachment evidence about the chief governmental witness even though the prosecutor knew about the evidence.

Pyle v. Kansas, 317 U.S. 213 (1942) discussed deliberate suppression of evidence favorable to the accused. The Court held this conduct constitutionally impermissible. The prosecutor's conduct in *Pyle* is similar to the prosecutor's conduct in the instant case. In *Pyle*, the Petitioner alleged, without refute:

> [H]is [Pyle's] imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him.

Pyle v. Kansas, 317 U.S. at 216 (1942). In the instant case, the Petitioner alleges:

> Defense Counsel [Chesnoff]: Your Honor, I was trying to conceptualize how the government responds when a specific Brady Agurs request is made, and I think the cases are clear that the obligation does not just rest with the prosecutor himself as a person, but he's a representative of law enforcement . . . our motion . . . included those representatives who were working to put the defendants in jail . . . *They were under a duty, all of them, to disclose that material which would have been effective in cross-examining him* [Duran] *so that a jury could determine whether his uncorroborated declaration . . were believable.*

United States v. Davis, DC No. SA-CR-88-36-JSL (Motion for New Trial Transcript) pp. 7-8 (8/13/90) (emphasis added). The actions in the instant case are no less constitutionally impermissible than *Pyle*. The prosecutor suppressed information known to the government (or available to them) to convict the Petitioner. The suppressed information has a direct bearing on the uncorrob-

orated testimony of an otherwise unbelievable witness; Deputy Marcario Duran.

The government relied, *in toto*, on Duran's testimony to convict the Petitioner of Illegal Use of a Communication Facility. The government largely relied on Duran's testimony to convict the Petitioner of the other alleged crimes. It was *Duran's* testimony that the Petitioner used the telephone to request the money be delivered. This conversation was not recorded. The jury had to rely on Duran's testimony for its alleged content.

Napue v. Illinois, 360 U.S. 264 (1959) extended the prosecutor's duty to disclose information. *Napue* precisely demonstrates the issue in the instant case. Under *Napue*, a misrepresentation involving the credibility of a government witness requires reversal of the defendant's conviction.

> The principle that a State may not knowingly use false evidence . . . to obtain a tainted conviction . . . does not cease to apply merely because the false testimony *goes only to the credibility of the witness.* The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is *upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.*

Napue v. Illinois, 360 U.S. at 269 (1959). The *Napue* Court reversed Napue's conviction.

Similarly, *Alcorta v. Texas*, 355 U.S. 28 (1957) holds that a misrepresentation by the prosecutor, involving *only* the credibility of a government witness requires a reversal of the defendant's conviction. The instant case requires no less proscription against the Petitioner's tainted conviction than the reversal mandated in *Alcorta*.

III. DETERMINING THE EXTENT OF DISCLOSURE REQUIRED IN CRIMINAL CASES: BRADY, AGURS, BAGLEY

From *Mooney* to *Alcorta*, this Court focused on the culpability of the prosecutor when determining if a dis-

covery-related due process violation existed. *United States ex. rel Thompson v. Dye*, 221 F.2d 763 (3rd Cir. 1955) analyzed access to evidence violations differently. The *Thompson* Court did not focus on the prosecutor's state of mind. Rather, they analyzed a defendant's due process rights by examining the *effects* of the suppresesd evidence on the ability of the accused to mount his defense.

United States v. Consolidated Laundries, Inc., 291 F.2d 563 (2d Cir. 1961) followed this reasoning. Absence of willful prosecutorial misconduct did not necessarily preclude the existence of a due process violation. These two cases represent harbingers for the eventual approach taken in *Brady*, *Agurs*, and *Bagley*.

Brady v. Maryland, 373 U.S. 83 (1963) discussed prosecutorial non-disclosure of favorable evidence in the context of a due process violation. This Court held "suppression . . . of evidence favorable to the accused *upon request* violate[s] due process where the evidence is material to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. at 87 (1963) (emphasis added). The Court's motivation was a concern for due process; they were not motivated by the willfulness of the prosecutor or the outcome of the trial.

The *Brady* decision suffered a flaw. The Court did not define "material" or determine the viewpoint from which it is measured. This led to an inconsistent standard of "materiality." This Court ostensibly resolved this problem in *United States v. Agurs*, 427 U.S. 97 (1976). The Court held that *Brady* applied in three particular situations. Each situation demanded a different standard of "materiality" and, correspondingly, a different level of prosecutorial disclosure. First, there is the situation where the government's case involved perjured testimony and the proseecutor knew or should have known about the perjury. This comprehends a strict standard of materiality. The Court refused to countenance the "corruption of

the truth seeking function of the trial process." *United States v. Agurs*, 427 U.S. at 104 (1976).

Second, in situations where undisclosed evidence was not requested by the defense, there is no reason to penalize the prosecution. *See, United States v. Agurs*, 427 U.S. at 111-12 (1976).

Third, there is the situation where the accused makes a specific pretrial request for information to which the prosecutor does not respond or says the information does not exist. In these situations, materiality becomes a "concern that the suppressed evidence might have affected the outcome of trial." *United States v. Agurs*, 427 U.S. at 104 (1976). Failure to respond in this situation is "seldom, if ever, excusable." *United States v. Agurs*, 427 U.S. at 106 (1976). This type of situation mirrors the instant case. The Petitioner knew the chief prosecution witness, Duran, was corrupt. He formulated a specific pretrial request for impeachment information. It is unthinkable the prosecutor could avoid the compelling nature of this request by denying the existence of an investigation into Duran. *Agurs* does not permit the government to profit by their deception. The prosecutor violated basic concepts of due process.

In an effort to clarify *Brady*, *Agurs* confused the matter. *Compare, Scurr v. Niccum*, 620 F.2d 186, 190-91 (8th Cir. 1980) (holding suppression of police reports suggesting a different perpetrator, when specifically requested and material required reversal) and *Thompson v. Missouri*, 724 F.2d 1314, 1318-19 (8th Cir.), *cert. denied*, 466 U.S. 961 (1984) (holding non-disclosure of witness statements, when specifically requested, did not require reversal. Trial court rejected the witness's credibility).

The confusion continued under *Agurs*, because "material" has three standards depending on the circumstances. This creates two problems. First, it is difficult to determine whether the evidence revealed prosecutorial perjury.

Second, the goal of guaranteeing a fair trial is not furthered by varying the standards of materiality.

This Court addressed these problems in *United States v. Bagley*, 473 U.S. 667 (1985). Ostensibly, *Bagley* simplified the *Agurs* analysis and created one standard of materiality to apply in all circumstances of prosecutorial nondisclosure. It is respectfully submitted, however, that the result may have confused the various circuit courts and confounded well-reasoned analysis of access to evidence questions.

Mr. Justice Blackmum interpreted *Brady* to require that prosecutors need only disclose evidence favorable to the accused. They need not open their entire file to the defense. *See, United States v. Bagley*, 473 U.S. at 675 (1985). Further, by treating any non-disclosure as error, *per se*, would create a duty to completely open the government's file to the accused. *See, United States v. Bagley*, 473 U.S. at 675, n.7 (1985).

Mr. Justice Blackmum's opinion may have restricted access to the prosecutor's evidentiary briefcase. However, *he acknowledged the problem inherent in culpable nondisclosure situations.* He rejected treating a nondisclosure as "newly discovered evidence" subject to harsh evidentiary standards. *See, United States v. Bagley*, 473 U.S. at 681 (1985). It would be improper to subject the defendant to a difficult evidentiary burden; that is, had the nondisclosed evidence been known at trial the result would have been different. *See, United States v. Agurs*, 427 U.S. at 112 (1976) (holding "whether the omitted evidence creates a reasonable doubt that did not otherwise exist.") To subject the accused to this heavy burden for evidence the prosecutor might have been aware of all along suggests there is no prosecutorial duty to disclose any evidence whatsoever.

Mr. Justice Blackmum specifically noted the difference between "newly discovered" impeachment evidence and impeachment evidence the prosecutor possessed but withheld from the accused. The Court adopted the strict

standard *Agurs* established for unrequested evidence. The Court extended this standard to encompass all situations of nondisclosure. They concluded,

> [E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

United States v. Bagley, 473 U.S. at 682 (1985). If this analysis, standing alone, applies to the instant case, the Petitioner must be granted a new trial. This is because the jury returned a guilty verdict against the Petitioner on the Illegal Use of a Communication Facility charge. The government relied completely, totally and unequivocally on Duran's testimony to support this conviction. In addition, it was Duran's testimony about the content of the call that led to the Petitioner's conviction on the other counts. *See, United States v. Davis*, DC No. SA-CR-88-36-JSL (Trial Transcript), pp. 888-920 (10/19/88). *Duran's impeachment as a corrupt and unscrupulous deputy would make his testimony unworthy. It is one thing for defense counsel to suggest a policeman is disingenuous. It is quite another to prove it.*

IV. THE CONFLICT AMONG THE FEDERAL CIRCUITS CAUSED BY THE DIFFERING FOCUS OF *BRADY*, *AGURS*, AND *BAGLEY* WARRANTS THE GRANTING OF THIS PETITION

Bagley was an effort to return to discrete analysis of often-complicated access to evidence issues. However, the differences between the due process focus of *Brady*, the procedural requirements of *Agurs* and the often-harsh results obtained under *Bagley* has unsettled the courts. Some lower courts, while applying the *Bagley* standard, have questioned its scope.

In *United States v. Risken*, 788 F.2d 1361, 1375 (8th Cir. 1986), the Court said the government's failure to

disclose known evidence favorable to the accused is incompatible with the tenets of *Brady*. This was true even though non-disclosure may not warrant a reversal under the *Bagley* reformulated materiality standard. Even though the *Risken* Court upheld the defendant's conviction, they were concerned about the improper government conduct. The Court cited extensively from the *Bagley* dissent:

> When the State does not disclose information in its possession . . . favorable to the defense, it precludes the trier of fact from . . . such information and thereby undermines the reliability of the verdict.

United States v. Risken, 788 F.2d at 1375 (8th Cir. 1986) (citation omitted).

Subsequent to the *Bagley* decision, the United States Court of Appeals for the Tenth Circuit considered *Bowen v. Maynard*, 799 F.2d 593 (10th Cir. 1986). They affirmed a district court order setting aside the defendant's three murder convictions. The convictions were constitutionally invalid. *Bowen* relied primarily on the *Agurs* standards of materiality rather than *Bagley* in reaching its result. The Court specifically stressed the important value of impeachment evidence in nondisclosure cases. They said, "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation." *Bowen v. Maynard*, 799 F.2d at 613 (10th Cir. 1986).

Under the strict mandate of *Bagley*, courts cannot consider possible trial strategy when making access to evidence decisions. A *Bagley* analysis severely limits a court's inquiry. *Bowen* establishes a much broader range of inquiry.

The *Bowen* decision significantly breaks with the *Bagley* analysis and its application in other federal circuits. *Bowen* makes specific reference to impeachment evidence. "Suppression of material which could be used

to impeach witnesses violates the Constitution if it deprives the defendant of a fair trial." *Bowen v. Maynard*, 799 F.2d at 610 (8th Cir. 1986). The facts of *Bowen* closely parallel the facts in the instant case. The Court noted "the evidence to convict would have been insufficient without the testimony of the two witnesses." *Bowen v. Maynard*, 799 F.2d at 610 (8th Cir. 1986). In the instant case, the government relied solely on Duran's testimony to convict the Petitioner on at least one charge.

The Seventh Circuit did not agree with *Bagley*'s restricted standard of materiality in *United States ex rel. Smith v. Fairman*, 769 F.2d 386 (7th Cir. 1985). The *Fairman* Court gave short shrift to the *Bagley* holding, preferring instead to concentrate on a *Brady-Agurs* analysis. Their focus centered on due process violations. They concluded that under any standard of materiality non-disclosure of exculpatory information was impermissible. The Court granted the defendant's requested *habeas corpus* relief.

Clearly, there is conflict regarding the appropriate scope of *Bagley* within several circuits. Additionally, various circuit courts have modified the harsh results often-inherent in a *Bagley* analysis. The United States Court of Appeals for the Eighth Circuit believes it permissible to consider the specificity of the defendant's disclosure request as a factor in determining "reasonable probability." If a defendant requested certain information, this may be interpreted as a strong indication of its materiality. However, the *Bagley* opinion is not determinative on this issue. *See, Patterson v. Black*, 791 F.2d 107, 110 n.2 (8th Cir. 1986). The *Patterson* Court pointed directly to an inconsistency in *Bagley* which could lead to uneven judicial application in the federal circuits. *Patterson* noted that Mr. Justice Blackmun's opinion, joined by Ms. Justice O'Connor, suggested disclosure specificity should be a factor in deciding the materiality of the requested evidence. However, Mr. Justice White's concurring opinion, joined by Mr. Justice Rehnquist and

Mr. Chief Justice Burger, stated specificity should not be a factor. *See, Patterson v. Black*, 791 F.2d at 110, n.2 (8th Cir. 1986).

Finally, *Bagley* may be limited by its own facts. The federal courts of appeal, in an effort to limit the application and scope of *Bagley*, may opt to ignore the case. The circuit courts would limit *Bagley* by restricting its holding to non-jury trials. Bagley waived his right to a jury trial. A district judge tried the case. The same judge denied Bagley's Motion for New Trial. The district judge, serving in the additional capacity of fact-finder, could easily determine there was "reasonable probability" of a different outcome had Bagley received the nondisclosed information. *Bagley* itself did not have the problem inherent in jury trials; trying to reconstruct what the jury would have decided faced with the same issue.

The *Bagley* holding causes conflict among the circuits. Additionally, the opinion may effectively violate fundamental concepts of due process. Nondisclosure of material evidence is the basis of a due process inquiry. *Bagley* does not address the fairness of the procedure. *Bagley* adopts a result-oriented approach for determining the materiality of nondisclosed evidence. Conceivably *Bagley* permits a prosecutor to use perjured testimony if an appellate court determines the perjury would not have affected the trial's outcome. If the fact-finder reaches the "right" result, due process is not violated. *See, United States v. Bagley*, 473 U.S. at 682 (1985).

However, due process is accomplished only by following proper procedures. *See*, Oaks, *Ethics, Morality and Professional Responsibility*, B.Y.U. L. Rev. 591 (1975). *Bagley* permits certain results to be termed "right" without following proper procedure. Thus, *Bagley* relies on a standard other than the traditional principals of due process. *Cf., Strickland v. Washington*, 466 U.S. 668, 711 (1984) (stating effective assistance of counsel guaran-

tees ensure convictions are obtained based on fundamentally fair procedures). The result of *Bagley* is that a defendants access to evidence is defined by the remedy. Due process is reformulated into a "due outcome" analysis. *Bagley* does not comport with due process because it is impossible to determine fair outcomes when the outcomes are based on flawed processes. *See*, Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev. 112, 129 (1972).

The *Bagley* formulation of access to evidence issues is difficult to apply. *Bagley* violations occur when there is a reasonable probability the undisclosed material evidence would change the trial's result. Thus, the prosecutor must speculate what effect this evidence may have on the trier of fact. However, "one cannot tell with any certainty what effect the evidence would have had, precisely because the evidence was not introduced." Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problem of Prosecutorial Discretion and Retrospective Review*, 53 Fordham L. Rev. 391, 412 (1984).

Because of the speculative efforts the prosecutor must undertake, *Bagley* undermines any incentive to disclose evidence. *The high materiality standard set by Bagley encourages prosecutorial nondisclosure.* Risk of reversal is slight and does not influence disclosure decisions. This is true even in cases of specific disclosures requested by the accused. *See, Steele, Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 976 (1984).

Finally, judicial interpretation and application of *Bagley* presents problems for federal appellate courts reviewing nondisclosure issues. Essentially, a judge must determine whether the outcome of trial was fair without the benefit of certain potentially material evidence. Viewed in retrospect, if the evidence was "material" then the process is unfair. The result becomes unreliable. On a determination of the fairness of the outcome, not the fairness of the process, the judge rules on the materiality of the evidence. The problem exists because the materiality

of the evidence must be known *before* it can be decided whether the outcome was fair. The entire process is circuitous.

The *Bagley* analysis does not require disclosure issues to comport with due process. Thus, the test for materiality allows the court to presume guilt before it is certain the defendant has been convicted by proper process. Upon review, the defedant faces a stern challenge. He must show that nondisclosed evidence would create reasonable doubt in the trial's outcome. This burden reverses the presumption of innocence.

The Petitioner believes that had he been provided the timely requested material about Duran, he would have been able to effectively confront the chief witness against him. Even assuming, *arguendo*, the propriety of the *Bagley* analysis, he would have had a different result at trial.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Writ of Certiorari be Granted on the question presented.

Respectfully submitted,

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